No. 05-184

Supreme Court, U.S.
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In The
Supreme Court of the United States

SALIM AHMED HAMDAN

Petitioner,

v.

DONALD H. RUMSFELD, et al.

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR *AMICUS CURIAE* IBRAHIM AHMED MAHMOUD AL QOSI IN SUPPORT OF PETITIONER

(TREATIES: ENFORCEABILITY ON HABEAS/MANDAMUS)

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QUESTIONS PRESENTED

1. Whether the military commission established by the President to try petitioner and others similarly situated for alleged war crimes in the "war on terror" is duly authorized under Congress's Authorization for the Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224; the Uniform Code of Military Justice (UCMJ); or the inherent powers of the President?

2. Whether petitioner and others similarly situated can obtain judicial enforcement from an Article III court of rights protected under the 1949 Geneva Convention in an action for a writ of habeas corpus challenging the legality of their detention by the Executive branch?

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Ibrahim Ahmed Mahmoud al Qosi is an alien detainee currently being held at the U.S. military installation in Guantamano Bay, Cuba. Mr. al Qosi was initially detained by Pakistani authorities in December 2001, and was turned over to the custody of the United States military and transferred to Afghanistan soon thereafter. In January 2002, Mr. al Qosi was flown to Guantanamo Bay. On July 3, 2003, after over 500 days of confinement, he was designated as one of the first six Guantanamo Bay detainees to be tried by Military Commission. Mr. al Qosi has a case pending before the United States District Court for the District of Columbia in which he is seeking, *inter alia*, a writ of habeas corpus and a writ of mandamus.

SUMMARY OF ARGUMENT

The plain text of 28 U.S.C. § 2241(c)(3) (the "Habeas Statute") provides that individuals detained in violation of any duly ratified treaty obligation, including the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 (the "GPW"), may challenge their detention in a habeas proceeding, regardless of the presence of additional non-treaty legislation. Put another way, the Habeas Statute implements all voluntarily assumed treaty obligations, at least to the extent of affording habeas relief. This straightforward reading of the statutory text is confirmed by the undisturbed precedent of this Court.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amicus* or his counsel, made a monetary contribution to the preparation of this brief.

The court of appeals failed to acknowledge both the plain text of the Habeas Statute and this Court's prior holdings. Even more, the court of appeals misstated the role of treaties in our constitutional scheme. The Framers of our Constitution intended most treaties to be judicially enforceable in any appropriate proceeding, including habeas, just like an act of Congress. This Court should correct those errors and reiterate the proper place of treaties in our country's judicial system.

In the event the Court concludes that Petitioner may not enforce his treaty rights under the GPW by means of a petition for a writ of habeas corpus, mandamus relief is necessary. Building on the common law right to mandamus, the modern Mandamus Act allows federal courts to hear "any action" to compel government officials to perform their duties, including those created by treaties. 28 U.S.C. § 1391. As Chief Justice John Marshall stated in 1803, mandamus "ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one." *Marbury v. Madison*, 5 U.S. 137, 168-69 (1803). In the absence of habeas relief, this is just such a case.

ARGUMENT

I. PETITIONER MAY ENFORCE HIS RIGHTS UNDER THE GPW IN AN ACTION FOR A WRIT OF HABEAS CORPUS.

A. The Plain Text of the Habeas Statute and This Court's Jurisprudence Provide for Habeas Relief When an Individual Is Detained in Violation of United States Treaty Obligations.

1. The Plain Text of the Habeas Statute Establishes That Individuals Held in Violation of Treaty Obligations Are Entitled to the Writ.

The Habeas Statute states: "The writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitution ***or*** laws ***or*** treaties of the United States." 28 U.S.C. § 2241(c)(3) (emphasis added). Thus, according to the plain text of the statute, Congress meant for the writ of habeas corpus to extend to prisoners held in violation of not just the Constitution and laws of the United States, but also the treaties thereof. The language could not be more emphatic. Indeed, by using the double disjunctive formulation " . . . or . . . or . . . ," Congress underscored its intent that treaty violations would form an independent basis for affording habeas relief, above and beyond such grounds as may exist under the Constitution or laws of the United States.[2]

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[2] The provisions of the Detainee Treatment Act of 2005 purporting to amend 28 U.S.C. § 2241 do not apply to this case. Under Section 1005(h)(1) of the Act, the changes to Section 2241 apply prospectively only. *See* Detainee Treatment Act of 2005, Title X, Dep't of Defense Appropriations Act of 2006, Pub. L. No. 109-148 (stating that changes "take effect on the date of the enactment of this Act;" *i.e.*, December 30, 2005); *see also Lindh v. Murphy*, 521 U.S. 320 (1997).

A court's goal in construing a statute is to ascertain and carry out the intent of the legislature. *See, e.g., Atl. Mut. Ins. Co. v. Comm'r*, 523 U.S. 382, 387 (1998) (stating that a court "must give effect to the unambiguously expressed intent of Congress") (citation and internal quotation marks omitted); *United States v. N.E. Rosenblum Truck Lines*, 315 U.S. 50, 53 (1942). The starting point for analysis is the plain text of the statute. *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409 (1993); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 200-01 (1976). In the absence of ambiguity, the plain text is also the ending point of the analysis. *See, e.g., Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002) ("The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent.") (citation and internal quotation marks omitted). Ambiguity is defined as language "capable of being understood in two or more possible senses or ways." *Chickasaw Nation v. United States*, 534 U.S. 84, 90, 94 (2001) (citing WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 77 (1985)).

The word "treaties" as used in the Habeas Statute is not ambiguous. Any individual held in violation of any ratified treaty of the United States is entitled to the Great Writ. To be sure, the Court has found the word "treaties" ambiguous in unrelated contexts. For example, in *Weinberger v. Rossi*, 456 U.S. 25 (1982), the Court considered whether a statute prohibiting employment discrimination on military bases unless permitted by "treaty" included even non-ratified Executive agreements. *Id.* at 29-30 (citing 5 U.S.C. § 7201). The Court found the word ambiguous on this score, and held that it should be construed broadly enough to encompass such agreements. *Id.* The ambiguity found in *Weinberger* is immaterial here, however. The question now before the Court concerns only whether duly ratified treaties such as the GPW are enforceable in a habeas proceeding. There is thus no need to

deliberate over the shades of gray raised by the extension of the term "treaties" in *Weinberger*, and no reason exists to deviate from a plain text reading of the statute in this case.

Moreover, this Court's jurisprudence makes clear that the existence *vel non* of ambiguity is to be determined by reference to the historical context in which the statutory terms were used. The question is not whether a term is ambiguous in the mind of a contemporary observer, but rather whether the term was capable of bearing more than one meaning at the time it was incorporated into the statute. *See, e.g., Amoco Prod. Co. v. S. Ute Tribe*, 526 U.S. 865, 873 (1999) (analyzing whether coalbed methane gas qualifies as "coal" within the meaning of the 1909 and 1910 Coal Lands Acts by looking to the common understanding of that term in 1909 and 1910); *see also Perrin v. United States*, 444 U.S. 37, 42 (1972) (" . . . unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning" at the time Congress enacted the statute). The relevant text of § 2241(c)(3) was added to the statute in 1867. *See* Act of Feb. 5, 1867, ch. 28, 14 Stat. 385. At that time, the term "treaties" contained no material ambiguity. Indeed, a common understanding of treaties had emerged in both the case law and legal treatises. For example, taking into consideration Chief Justice Marshall's opinion in *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829), an 1869 treatise defined the term as follows:

> In international law. An agreement between two or more independent states. An agreement, league, or contract between two or more nations or sovereigns, formally signed by commissioners properly authorized, and solemnly ratified by the several sovereigns, or the supreme power of each state.

> A treaty is, in its nature, a contract between two nations; not a legislative act. It does not generally effect of itself the object to be accomplished, especially so far as its operation is infra-territorial, but is carried into execution by the sovereign power of the respective parties to the instrument.
>
> In the United States, a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. . . .[3]

ALEXANDER M. BURRILL, A LAW DICTIONARY AND GLOSSARY 543 (2d ed. Baker, Voorhis & Co. 1869) (internal citations omitted). Because it is an "agreement, league, or contract between two or more nations or sovereigns, formally signed by commissioners properly authorized, and solemnly ratified," there can be no doubt that the GPW is a "treaty" within the scope of the Habeas Statute as drafted by the 1867 Congress. The Court need look no further than the plain text of the Habeas Statute to answer the question presented. Because the proposed military commission trial of Petitioner violates the GPW, he is entitled to a writ of habeas corpus.[4]

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[3] For a discussion of the distinction between treaties that "operate of themselves" and those that do not, *see infra*, Section (I)(B)(2).

[4] It is beyond the scope of this *amicus* brief to argue the various ways in which the proposed trial by military commission of Mr. Hamdan (and *amicus curiae*, Mr. al Qosi) violate the GPW. Those issues are addressed in Petitioner's brief and by other *amici*.

2. This Court Has Repeatedly Held That Habeas Relief Is Available for Treaty Violations.

This Court has confirmed this straightforward reading of the Habeas Statute on repeated occasions. *E.g., Mali v. Keeper of the Common Jail*, 120 U.S. 1 (1887) (hereinafter "*Wildenhus*"), *aff'g In re Wildenhus*, 28 F. 924 (C.C.N.J. 1887); *United States v. Rauscher*, 119 U.S. 407 (1886). These cases carry particular weight for at least two reasons. First, prior interpretation of a statute is binding in later cases interpreting the same statute. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done."), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071; *Rasul v. United States*, 542 U.S. 466, 493 (2004) (Scalia, J., dissenting) (referring to the "almost categorical rule of *stare decisis* in statutory cases"). Second, insofar as *Wildenhus* and *Rauscher* were decided in the years more closely following enactment of the 1867 Habeas Statute, they best articulate the intent of the Reconstruction Era Congress. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 700-02 (2004) (citing contemporaneous case law and commentary to construe the Alien Tort Claims Act).

In *Wildenhus*, *supra*, the Consul of Belgium had filed a petition for a writ of habeas corpus for the release from a New Jersey jail of three Belgian citizens, one charged with murder of a fellow Belgian on board a Belgian ship docked in New Jersey and two held to serve as witnesses at trial against the first. The Consul based his petition on a treaty between the United States and Belgium which provided that the respective consuls "shall have exclusive charge of

the internal order" of merchant vessels of their nations, and argued that New Jersey did not have jurisdiction over a crime taking place between Belgians on a Belgian ship. The Court framed the issue presented as follows:

> By §§ 751 and 753 of the Revised Statutes [where what is now § 2241(c)(3) was then codified] the courts of the United States have power to issue writs of habeas corpus which shall extend to prisoners in jail when they are 'in custody in violation of the constitution or a law or treaty of the United States,' and the question we have to consider is, whether these prisoners are held in violation of the provisions of the existing treaty between the United States and Belgium.

120 U.S. at 11. With no further inquiry, citation, or justification aside from the plain language of the Habeas Statute, the Court concluded that the treaty between the United States and Belgium could serve as a basis for habeas relief. It stated:

> The treaty is part of the supreme law of the United States, and has the same force and effect in New Jersey that it is entitled to elsewhere. If it gives the consul of Belgium exclusive jurisdiction over the offence which it is alleged has been committed within the territory of New Jersey, *we see no reason why he may not enforce his rights under the treaty by writ of habeas corpus* in any proper court of the United States.

Id. at 17 (emphasis added). The Court's language is striking and shows that the text of the Habeas Statute could not be more clear – "we see no reason why he may not enforce his rights under the treaty by writ of habeas corpus. . . ." *Id.* From the Court's perspective, the only hard question was whether the crimes at issue fell within the scope of the treaty. Although the Court ultimately held that they did not, *id.* at 17-18, this in no way minimizes

the import of the holding on the enforceability of treaty rights on habeas.

In *Rauscher, supra*, decided one year before *Wildenhus*, the Court similarly underscored the availability of habeas relief for treaty violations. In that case, defendant Rauscher was extradited to the United States from Great Britain pursuant to an 1842 extradition treaty. In contravention of the treaty, Rauscher was indicted for and convicted of a crime different from the one with which he had been charged in the extradition proceedings. 119 U.S. at 409. Before judgment was entered, the Circuit Court certified the question of the propriety of the conviction to this Court. *Id.* The Court concluded that the indictment and conviction were improper because they ran afoul of the extradition treaty. *Id.* at 430. After first reviewing at length the importance of treaties in American law, *id.* at 418-20, the Court considered the remedies available to detainees in circumstances like Rauscher's. By way of example, the Court noted that defendants could proceed by "writ of error from the Supreme Court of the United States to the state court which may have committed such an error. The case being thus removed into that court, the just effect and operation of the treaty upon the rights asserted by the prisoner would be there decided." *Id.* at 431. More significantly for present purposes, the Court also ruled:

> If the party, however, is under arrest and desires a more speedy remedy in order to secure his release, a writ of habeas corpus from one of the Federal judges or Federal courts, issued on the ground that he is restrained of his liberty in violation of the Constitution or a law *or a treaty* of the United States, will bring him before a Federal tribunal, where the truth of that allegation can be inquired into, and, if it be well founded, he will be discharged.

Id. (emphasis added). The Court concluded by declaring:

> *This is a complete answer to the proposition that the rights of persons extradited under the treaty cannot be enforced by the judicial branch of the government, and that they can only appeal to the executive branches of the treaty governments for redress.*

Id. (emphasis added).

Consistent with the text of 28 U.S.C. § 2241(c)(3), this Court has thus repeatedly ruled that individuals held in violation of the treaty obligations of the United States are entitled to a writ of *habeas corpus*. Interestingly, in both *Rauscher* and *Wildenhus* the Court did not concern itself with the question of whether or not the relevant treaty obligations were accompanied by additional non-treaty legislation. Instead, in line with the Supremacy Clause, *see infra*, Section (I)(B)(1), the Court assumed that all ratified treaties are the law of the land and read the Habeas Statute itself to afford a basis for relief for treaty violations. The only pertinent question was whether the facts presented amounted to a violation of the treaties at issue.

B. The Court of Appeals Not Only Ignored the Text of the Habeas Statute and This Court's Precedent, It Misunderstood the Role of Treaties in Our Constitutional Scheme.

The court of appeals erroneously ruled that a violation of the GPW cannot form the basis of a successful habeas action. *Hamdan v. Rumsfeld*, 415 F.3d 33, 38-40 (D.C. Cir. 2005). In so doing, it ignored both the plain text of the Habeas Statute and this Court's prior holdings in *Rauscher* and *Wildenhus*. Indeed, the lack of careful consideration by the court of appeals is demonstrated in the first instance by the fact that it did not mention, much

less come to grips with the implications of, either decision. The court of appeals' decision was based on two ostensible reasons: (1) treaties "do not create judicially enforceable individual rights," and (2) the lower court considered itself bound by footnote *dictum* from *Johnson v. Eisentrager*, 339 U.S. 763 (1950), to the effect that "responsibility for observance and enforcement of . . . [rights protected by the 1929 Geneva Convention] is upon political and military authorities." *Hamdan*, 415 F.3d at 39-41 (citing *Eisentrager*, 339 U.S. at 789 n.14). It was wrong on both counts.

The court of appeals' error was more fundamental than merely ignoring the statutory text and overlooking binding precedent from this Court that refutes *Eisentrager*. It misconstrued the place of treaties in the constitutional order the Framers designed, as well as the duty of United States courts to adjudicate treaty-based claims. Put differently, it is not surprising the court of appeals incorrectly concluded that treaty violations were not cognizable in habeas because it misunderstood the judiciary's general obligation to enforce treaty rights in any appropriate proceeding, including habeas.

1. The Framers of Our Constitution Intended Most Treaties To Be Judicially Enforceable.

The Supremacy Clause states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2. In construing this language, it is important to understand the Framers' purpose in including it. Under the prevailing British common law at the time the Constitution was drafted, treaties of the United Kingdom did *not* constitute the law of the land, and did *not* provide rules of decision in

court, absent implementing legislation from Parliament. *See* Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 697-98 (1995). Owing in part to the experience under the Articles of Confederation, during which period states routinely flouted federal treaty mandates, the Framers specifically chose to adopt the contrary rule in the new Constitution. *See Sosa*, 542 U.S. at 716 ("The Continental Congress was hamstrung by its inability to 'cause infractions of treaties, or of the law of nations to be punished.'" (quoting J. MADISON, JOURNAL OF THE CONSTITUTIONAL CONVENTION 60 (E. Scott ed. 1893))). The Supremacy Clause was designed specifically to make this change clear. *See* Vazquez, *supra*, at 699 (stating that the Supremacy Clause was adopted "to avert violations of treaties attributable to the United States, and . . . the Founders sought to accomplish this goal by making treaties enforceable in the courts at the behest of affected individuals without the need for additional legislative action, either state or federal"). In other words, the Supremacy Clause was included in the Constitution to confirm that in the United States a treaty would carry the same weight and equally provide rules of decision in court as an act of Congress.

The Court's *Rauscher* opinion makes clear the distinction between the British and American rules on the applicability of treaties in domestic law. In evaluating the question before it – whether Rauscher's indictment and conviction violated the Anglo-American extradition treaty – the Court looked first for relevant judicial authority from Great Britain. It found little, "for the reason that treaties made by the crown of Great Britain with other nations are not in those courts considered as part of the law of the land, but the rights and the duties growing out of those treaties are looked upon in that country as matters confided wholly for

their execution and enforcement to the executive branch of the government." *Rauscher*, 119 U.S. at 417.[5]

The Court then went on to review its own jurisprudence, pausing first upon Chief Justice Marshall's opinion in *Foster v. Neilson*, *supra*, in which he stated:

> A treaty is in its nature a contract between two nations, not a legislative act. . . . In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself, without the aid of any legislative provision. . . .

Rauscher, 119 U.S. at 418 (citing *Foster*, 27 U.S. (2 Pet.) at 314). The Court next turned to the *Head Money Cases*, 112 U.S. 580 (1884), in which the Court again observed that a "treaty is primarily a compact between independent nations." 119 U.S. at 418 (quoting *Head Money Cases*, 112 U.S. at 598). However, it went on:

> But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. . . . The Constitution of the United States places such provisions as these in the same category as other laws of Congress [in the Supremacy Clause]. A treaty, then, is a law of

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[5] The Court's analysis also cites an 1867 English treatise distinguishing the domestic application of treaties in both countries: "in England, [relevant treaty] provision[s] could not come into effect without an act of parliament, but in the United States a treaty is as binding as an act of congress." *Id.* (citing Clarke, Ext. 38 (1867)) (internal quotation marks omitted).

> the land, as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

Rauscher, 119 U.S. at 418-19 (quoting *Head Money Cases*, 112 U.S. at 598-99) (internal quotations omitted). From these principles, the Court concluded that the 1842 extradition treaty was "the supreme law of the land, which the courts are bound to take judicial notice of, and to enforce in any appropriate proceeding the rights of persons growing out of that treaty," including habeas. *Id.* at 419.

2. The Court of Appeals Misconstrued This Court's Precedent on the Judicial Enforceability of Treaties.

The court of appeals misunderstood this Court's jurisprudence to stand for the proposition that treaties depend for enforcement only on the "interest and honor" of states parties, and from this concluded that violations of treaties are not judicially cognizable. *Hamdan*, 415 F.3d at 38-39. But as even the summary discussion of *Foster*, the *Head Money Cases* and *Rauscher* above makes clear, the court of appeals' conclusion turns this Court's precedents on their head.

The court of appeals, for instance, cited the *Head Money Cases* for the idea that "a treaty is primarily a compact between nations," and "depends for the enforcement of its provisions on the interest and honor of the government which are parties to it." *Hamdan*, 415 F.3d at 39 (citing *Head Money Cases*, 112 U.S. at 598). Yet, the

real import of the *Head Money Cases* is found in the language that begins where the court of appeals' analysis ends. As discussed above, the full quotation of the Court in the *Head Money Cases* in fact explained that many treaties are judicially enforceable from the moment they are ratified because when treaty "rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute." 119 U.S. at 418-19. Thus, rather than supporting the court of appeals' reasoning, the decision in the *Head Money Cases,* fairly read, contradicts it.

The court of appeals similarly misunderstood the other cases it cited for the proposition that if a treaty is violated, it "'becomes the subject of international negotiations and reclamation,' not the subject of a lawsuit." *Hamdan*, 415 F.3d at 38-39 (citing *Head Money Cases*, 112 U.S. at 598; *Charlton v. Kelly*, 229 U.S. 447, 474 (1913); *Whitney v. Robertson*, 124 U.S. 190, 194-95 (1888); and *Foster*, 27 U.S. (2 Pet.) at 306, 314, *overruled on other grounds*, *United States v. Percheman*, 32 U.S. (7. Pet.) 51 (1833)). As it did with the *Head Money Cases*, the court of appeals relied on carefully excised phrases taken out of context, and failed to consider the totality of those opinions. Properly read, those cases, just like the *Head Money Cases*, contemplate that the majority of treaties may in fact become "the subject of a lawsuit."

The two oldest cases, *Foster* and *Percheman,* show that the Court fully expected that the judiciary would adjudicate treaty-based claims, so long as the treaty concerned fell within the broad category of treaties that operate of themselves, "without the aid of the legislature." *Foster*, 27 U.S. (2 Pet.) at 314. *Foster* involved a land title dispute in which the Court was charged with determining the applicability of the 1819 "treaty of amity, settlement, and limits" in which Spain ceded all of its territory east of

the Mississippi River to the United States. The treaty stipulated that all Spanish land grants made before January 24, 1818, "*shall be ratified and confirmed* to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion" of the Spanish king. *Id.* at 310 (emphasis added). While the plaintiff argued that the treaty affirmed the property rights Spain had earlier granted his predecessor in interest, the defendant asserted that Spain did not have title to the land at the time it made its initial grant. In his ruling, Chief Justice Marshall articulated for the first time what has since come to be understood as the dichotomy between "self-executing" and "non-self-executing" treaties. He wrote:

> Our constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself, without the aid of any legislative provision; but when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial, department; and the legislature must execute the contract before it can become a rule for the court.

Id. at 314. To discern whether the treaty "operated of itself" or instead "imported a contract" promising future action by the legislature, the Court looked no further than the text of the treaty itself:

> The article under consideration does not *declare* that all the grants made by his catholic majesty before the 24th of January 1818, *shall be valid* to the same extent as if the ceded territories had remained under his dominion. It does not say that those grants are *hereby confirmed*. *Had such been its language, it would have acted directly on*

> *the subject, and would have repealed those acts of congress which were repugnant to it*; but its language is that those grants *shall be ratified and confirmed* to the persons in possession, &c. By whom shall they be ratified and confirmed? This seems to be the language of a contract; and if it is, the ratification and confirmation which are promised must be the act of the legislature.

Id. at 314-15 (emphasis added). Thus, the 1819 treaty could not serve as a rule of decision, but only because it did not "declare" or "confirm" the rights of the pre-1818 Spanish grantees. Rather (at least as initially construed in *Foster*), it explicitly contained executory elements contemplating an intervening act of Congress. Justice Marshall's opinion thus makes clear the limited nature of the category of treaties that "import a contract" requiring execution. Only those treaties that expressly contain executory undertakings that require additional action to complete are included. In all other cases, whenever a treaty declares or affirms rights, it is "to be regarded in courts of justice as equivalent to an act of the legislature." *Id.* at 314. Accordingly, the Chief Justice's analysis in *Foster* demonstrates that any ratified treaty that declares the rights of individuals, and does not expressly "import a contract" requiring something else to be done, is equivalent to an act of the legislature and must be enforced by the judiciary as it would an act of Congress.

Interestingly, in the *Percheman* case four years later, the Court confirmed that treaties that declare rights can in fact create rules of decision in our courts without further action by Congress. As did *Foster*, *Percheman* involved a land title dispute implicating the 1819 treaty of amity, settlement, and limits between Spain and the United States. This time, the Court had both the Spanish and English texts of the treaty before it, and determined that the Spanish text provided that Spanish land grants

prior to 1818 "shall *remain* ratified and confirmed to the persons in possession of them . . . " 32 U.S. (7 Pet.) at 88 (emphasis added). The Court held that the English and Spanish versions of the treaty could "without violence, be made to agree," *id.*, and that even though the English version presented in *Foster* stated that pre-1818 Spanish land grants "*shall be* ratified and confirmed," these words, on reexamination in light of the Spanish text, did not necessarily contemplate some future legislative act, but rather "may import that . . . [the land grants] 'shall be ratified and confirmed' by force of the instrument itself." *Id.* at 89. Thus, when faced with conflicting translations of key treaty provisions – one supporting a reading in which the treaty "operated of itself" and the other supporting a reading which "imported a contract" – Chief Justice Marshall chose the former, and proceeded to apply the provisions of the treaty to the dispute before him.

Taken together, *Foster* and *Percheman* demonstrate that from its earliest years, this Court has recognized the judiciary's constitutional role in enforcing treaty-based rights, excepting only those limited cases where the terms of the treaty itself contain executory elements unambiguously leaving work to be done by the political branches and promising that such work will be done (*i.e.*, "import a contract").

Whitney v. Robertson, also cited by the court of appeals, underscores the status of treaties in our constitutional scheme, not their lack of enforceability. In that case, plaintiffs argued that they should not be required to pay duties on sugar imported from the Republic of San Domingo because a bilateral treaty with the United States required that goods from that country be admitted to the United States on the same terms as similar goods from any other foreign country. 124 U.S. at 191. The Court rejected plaintiff's claim, and held that legislation authorizing the exaction of duties passed subsequent to the

ratification of the treaty superseded the treaty's provisions. *Id.* at 194. The Court's analysis was, however, based on the conventional principle that "the one last in date will control the other." *Id.* Even so, the Court emphasized the importance of treaties in the framework of our Constitution. It stated: "By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other." *Id.* Thus, contrary to the position adopted by the court of appeals, treaties do not have any less force and effect in our legal system than legislation. They are entitled to equal respect and the courts should be no less vigilant in monitoring fidelity to one than the other.

Charlton v. Kelly, the last decision cited by the court of appeals for the contention that treaties cannot "become the subject of a lawsuit," actually proves the opposite point – the judiciary has the obligation to enforce treaty-based rights and duties. At issue in *Charlton* was an extradition treaty between the United States and Italy that required that both governments deliver up all "persons" charged with committing specified crimes in one country and then seeking refuge in the other. 229 U.S. at 465. Defendant Charlton, a U.S. citizen, sought habeas relief because, while Italy consistently interpreted the word "persons" to exclude its own citizens, the United States regularly extradited its own citizens for crimes committed in Italy. *Id.* at 475. This Court affirmed the lower court's denial of the habeas petition. In so doing, the Court observed that the United States may have had the right to abrogate the treaty at one time, but had waived any such right by continuing to deliver up its own citizens. The concluding line of the Court's opinion is a resounding statement of the judiciary's role in treaty enforcement:

> The executive department having thus elected to waive any right to free itself from the obligation to deliver up its own citizens, it is the plain duty of this court to recognize the obligation to surrender the appellant as one imposed by the treaty as the supreme law of the land and as affording authority for the warrant of extradition.

Id. at 476.

As the foregoing discussion makes clear, the court of appeals' opinion is based on a fundamental misreading of this Court's decisions concerning the place of treaties in American law. The anti-treaty bias reflected in the court of appeals' opinion is contrary to the scheme crafted by the Framers of our Constitution and set out in the Supremacy Clause. Although a narrow category of treaties explicitly containing executory elements may not be judicially enforceable without the requisite legislative action, this Court has repeatedly underscored the judiciary's role in ensuring compliance with a broader set of treaty-based rights and duties. Viewed against this background, there is nothing remarkable about the ease with which the Court in *Wildenhus* and *Rauscher* concluded that habeas claims may be grounded on treaty violations. Especially given the plain text of the Habeas Statute, in which the 1867 Congress so explicitly reiterated the importance of treaty-based rights, this Court should conclude that the GPW declares rights that are enforceable upon petition for a writ of habeas corpus.[6]

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[6] Even were one to accept the court of appeals' erroneous conclusion that treaties generally require legislative execution in order to become "the subject of a lawsuit," the Habeas Statute itself can be read to implement any and all ratified treaty obligations, at least to the extent of affording habeas relief.

3. The Footnote Dicta in *Eisentrager* Does Not Answer the Question Presented.

The court of appeals erred further in concluding that footnote 14 of this Court's opinion in *Johnson v. Eisentrager*, *supra*, answered the question about the applicability of the GPW in the negative.[7] It did not. The Court's statements in footnote 14 constituted dictum and, as such, are without precedential value. Time and time again, this Court has explained that, "[d]ictum settles nothing, even in the court that utters it." *Jama v. Immigration and Customs Enforcement*, 125 S. Ct. 694, 706 (2005); *see also U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24 (1994) (invoking the Court's "customary refusal to be bound by dicta").

The opening line of Justice Jackson's majority opinion in *Eisentrager* states: "The ultimate question in this case is one of jurisdiction of civil courts of the United States *vis-à-vis* military authorities in dealing with enemy aliens overseas." 339 U.S. at 765. The Court answered this question by holding that nonresident enemy aliens captured and held overseas have no constitutional right to be heard in U.S. courts. *See id.* at 781. The brief footnote discussing the petitioners' right to enforce the 1929 Geneva Convention was irrelevant to this disposition. Once the

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[7] Footnote 14 states, "We are not holding that these prisoners have no right which the military authorities are bound to respect. The United States, by the Geneva Convention of July 27, 1929, 47 Stat. 2021, concluded with forty-six other countries, including the German Reich, an agreement upon the treatment to be accorded captives. These prisoners claim to be and are entitled to its protection. It is, however, the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention." 339 U.S. at 789 n.14.

Court determined that it lacked jurisdiction, any discussion of the merits of petitioners' treaty claims was unnecessary and therefore dictum. Indeed, in his dissenting opinion, Justice Black pointed out that the entire section of the majority's opinion in which footnote 14 appears was composed of "gratuitous conclusions." *Id.* at 794.

Even as the *Eisentrager* majority dropped a footnote to record its view that the petitioners could not themselves enforce their rights under the 1929 Geneva Convention, it proceeded to consider their treaty-based claims on the merits in the next two paragraphs of the opinion's text. *See id.* at 789-90. Thus, the Court itself underscored the gratuitous nature of its observation by disregarding it in subsequent portions of its decision.

The court of appeals' reliance on *Eisentrager's* footnote dictum was particularly misplaced in light of this Court's more considered opinions addressing the enforceability of treaty rights under the Habeas Statute in *Wildenhus* and *Rauscher*, *supra*. These decisions, closer in time to the passage of the Habeas Statute and never overturned by legislative action, were not even cited, much less overruled, by *Eisentrager*. As such, *Eisentrager* was doubly dubious as precedent, particularly on a question of such great import. *See Rauscher*, 119 U.S. at 431 (stating that the availability of habeas relief "is a complete answer to the proposition that the rights of persons extradited under the treaty cannot be enforced by the judicial branch of the government, and that they can only appeal to the executive branches of the treaty governments for redress").

The court of appeals' reliance on the *Eisentrager* footnote was ill-advised for still another reason. As this Court addressed at some length in *Rasul*, *supra*, the *Eisentrager* opinion concerned only petitioners' constitutional right to habeas, not the distinct statutory rights created by the Habeas Statute. *See Rasul*, 542 U.S. at 476-79. Even

accepting that footnote 14 constituted part of *Eisentrager's* holding (which it did not), and that it overruled *Wildenhus* and *Rauscher sub silentio* (which it also did not), the most that could be concluded from it is that detainees have no *constitutional* right to habeas relief premised on treaty violations. This, of course, is a different question from the one presented here; that is, whether federal detainees have a *statutory* right to habeas relief when the Executive violates voluntarily assumed treaty obligations. Because the Habeas Statute, as repeatedly construed by this Court, so clearly provides that they do, *Eisentrager* is incapable of bearing the weight the court of appeals tried to put on it.

C. The GPW Can Be Applied in This Case.

As the foregoing analysis demonstrates, Mr. Hamdan is entitled to a writ of habeas corpus based on violations of the GPW. The Convention is a ratified treaty of the United States, and it declares rights which are capable of being violated by Executive detention.[8] *See* 28 U.S.C. § 2241(c)(3).

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[8] The Convention repeatedly refers to itself as a rights-conferring instrument. For example, Article 6 states that High Contracting Parties may not make special agreements that "adversely affect the situation of prisoners of war, as defined by the present Convention, nor restrict the rights which it confers upon them." GPW, art. 6. Similarly, Article 7 states that "[p]risoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention . . . " *Id.*, arts. 6, 7 (emphasis added). Still further, in Article 5, the Convention states that if there is any doubt about whether a person is a prisoner of war as defined by Article 4, they "shall enjoy *the protection* of the present Convention until such time as their status has been determined by a competent tribunal." *Id.*, arts. 4, 5 (emphasis added). The use of the phrase "protection of this Convention" signifies that the Convention acts of itself to impart rights to individuals. *Cf. Medellin v. Dretke*, 125 S. Ct. 2088, 2104 (2005) (observing that the Court "has repeatedly enforced treaty-based rights of individual foreigners, allowing them to assert claims arising from various treaties," even in the absence of any "special magic words" in the text of those treaties.) (O'Connor,

(Continued on following page)

Nothing more is required either under the Habeas Statute or this Court's precedent. Indeed, this case follows *a fortiori* from *Wildenhus*, in which the Court held that there was "no reason why" a writ for habeas corpus could not issue. 120 U.S. at 17. The treaty there gave the Belgian Consul in the United States "exclusive charge" over crimes committed by Belgian nationals on board Belgian ships. When three Belgian citizens were detained in New Jersey as a result of an incident on board a Belgian ship, the Consul brought a habeas action seeking the release of his fellow citizens. Mr. Hamdan's case is stronger than the Belgian Consul's for at least two reasons. First, here it is Mr. Hamdan himself who is being detained in violation of the applicable treaty. His rights are thus being more directly impinged by Executive action. Second, the rights-declaring character of the GPW is much more obvious that the jurisdictional treaty at issue in *Wildenhus*. Given that the Belgian Consul was capable of using a treaty-based guarantee of exclusive jurisdiction to effect the release of others, there is even less "reason why" Mr. Hamdan cannot enforce his more obvious rights under the GPW "by writ of habeas corpus in any proper court of the United States." *Id.*

II. IN THE EVENT THE COURT FINDS THAT A PETITION FOR A WRIT OF HABEAS CORPUS IS NOT THE APPROPRIATE VEHICLE FOR PETITIONER TO ENFORCE HIS TREATY RIGHTS UNDER THE GPW, MANDAMUS RELIEF IS NECESSARY.

If the Court concludes notwithstanding the text of the Habeas Statute and the weight of precedent that Mr.

Stevens, Souter, and Breyer, JJ., dissenting) (citing *Asakura v. Seattle*, 265 U.S. 332 (1924) and *Kolovrat v. Oregon*, 366 U.S. 187 (1961)).

Hamdan may not enforce his treaty rights under the GPW by means of a petition for a writ of habeas corpus, a writ of mandamus is necessary.[9]

28 U.S.C. § 1361 provides that district courts have jurisdiction over "*any action* in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361 (emphasis added). This section codifies the common law of mandamus and make writs of mandamus available to the same extent as afforded at common law. *See Heckler v. Ringer*, 466 U.S. 602, 616 (1984). As stated in BLACKSTONE'S COMMENTARIES, the use of mandamus to enforce individual rights existed under the British legal system long before the founding of this nation: "A writ of mandamus is, in general, a command . . . directed to any person, corporation, or inferior court of judicature . . . requiring them to do some *particular* thing therein specified [which is] consonant to right and justice." 3 WILLIAM

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[9] As noted above, *see supra* n. 2, the Detainee Treatment Act does not alter the application of the Habeas Statute to this case. Neither does it effect the availability of mandamus relief. Indeed, even if the changes to 28 U.S.C. § 2241 are construed to apply retrospectively to deprive the courts of habeas jurisdiction in pending cases, mandamus jurisdiction over this case remains. Although the newly created section 2241(e)(2) purports also to deprive the courts of jurisdiction over "any other action . . . relating to any aspect of the detention" by Guantanamo detainees, Detainee Treatment Act § 1005(e)(1), this action does not relate to any aspect of Petitioner's "detention." Rather, it relates to the Executive's attempt to try him and others similarly situated before an unlawful military commission in contravention of his GPW rights. *See* 151 CONG. REC. S14,253 (Dec. 21, 2005) ("[T]he language in Section [1005(e)(2)] that prohibits 'any other action against the United States' applies only to suits brought relating to an 'aspect of detention by the Department of Defense.' Therefore, it is my understanding that this provision would not affect the ongoing litigation in *Hamdan v. Rumsfeld* before the Supreme Court because that case involves a challenge to trial by military commission, not to an aspect of a detention. . . .") (statement of Sen. Feingold).

BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 110 (Chicago, Univ. of Chicago Press 1979) (1768) (emphasis in original). "For it is the peculiar business of the court" to enforce "the due exercise of [nondiscretionary] judicial or ministerial powers . . . not only by refraining their excesses, but also by quickening their negligence, and obviating their denial of justice." *Id.* at 110-11.

The enduring importance of mandamus in American law was cemented by *Marbury v. Madison*. Quoting Lord Mansfield, Chief Justice Marshall stated:

> "Whenever . . . there is a right to execute an office, perform a service, or exercise a franchise (more specifically if it be in a matter of public concern, or attended with profit) and a person is . . . dispossessed of such right, and has no other specific legal remedy, this court ought to assist by mandamus, upon reasons of justice, as the writ expresses, and upon reasons of public policy. . . ." In the same case, he says, "this writ ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one."

5 U.S. at 168-69.

This Court has long recognized that writs of mandamus may issue to direct compliance with duties created not only by the Constitution and laws of the United States, but also by treaties. In *Jordan v. Tashiro*, 278 U.S. 123 (1928), for example, Japanese aliens residing in California sought a writ of mandamus to the Secretary of State of California to secure the right to form business enterprises as provided in the Treaty of Commerce and Navigation between the Government of the United States and the Empire of Japan. *Id.* at 124. The Court granted the writ, finding that (1) the treaty granted Japanese citizens the privilege of carrying on trade within the United States,

and (2) the Secretary erred by giving the terms thereof an unduly narrow reading. *Id.* at 126-28. In reaching its holding, the Court recognized:

> The principles which should control the diplomatic relations of nations, and the good faith of treaties as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. Upon like ground, where a treaty fairly admits of two constructions, one restricting the rights that may be claimed under it and the other enlarging them, the more liberal construction is preferred.

Id. at 127.

More recently, the Court took up the question of whether petitioners may enforce the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters by seeking a writ of mandamus. *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522 (1987). Although it ultimately denied the writ because the treaty in question was "intended as a permissive supplement, not a pre-emptive replacement" of other methods of securing evidence, the Court nonetheless evaluated the petitioners' claim on the merits. *Id.* at 536. In so doing, it necessarily recognized the continuing validity of enforcing treaty rights in an action for mandamus.

Under this Court's precedent, mandamus may issue if: the party seeking the relief has "no other adequate means to attain the relief he desires"; the "right to issuance of the writ is 'clear and indisputable' "; and the issuing court is "satisfied that the writ is appropriate under the circumstances." *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 380-81 (2004) (internal citations omitted). If the Court finds that a petition for a writ of

habeas corpus is not the appropriate vehicle for Mr. Hamdan and other detainees similarly situated to enforce their treaty rights under the GPW, there would be "no other adequate means to attain the relief" they seek than mandamus. *See id.* In such event, and especially in light of the importance of treaties in our constitutional scheme as discussed at length in Section (I)(B) above, there could be no more appropriate application of Lord Mansfield's admonition that writs of mandamus "ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one." *Marbury*, 5 U.S. at 169 (quoting *King v. Baker*, 3d Burrows 1266).

As noted above, *see supra* n.4, it is beyond the scope of this amicus brief to analyze each of the ways in which Mr. Hamdan's proposed trial by military commission violates the United States' "clear and indisputable" treaty duties under the GPW. Those matters are well-covered in Mr. Hamdan's brief on the merits and in the briefs of other *amici*. *Amicus curiae* Mr. al Qosi does note, however, that it is no defense in these circumstances to argue that compliance with the duties enshrined in the GPW involves some measure of discretion, and thus are insufficiently "clear." As this Court has observed, every duty involves an irreducible measure of discretion, but that fact cannot be used to eviscerate the office of mandamus. The Court's decision in *Roberts v. United States*, 176 U.S. 221 (1900), is particularly instructive:

> Every statute to some extent requires construction by the public officer whose duties may be defined therein. . . . Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore

> it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required.

Id. at 231; *see also id.* (recognizing that the writ of mandamus would "become practically valueless" if not granted where "a public officer is commanded to do a particular act by virtue of a particular statute").

In the absence of habeas relief, mandamus would not only be "appropriate" under the circumstances, it would be necessary to ensure fidelity to our Constitution. The Supremacy Clause places treaties on par with both our Constitution and statutes, U.S. CONST. art. VI, cl. 2; Article III, section 2 states that "the judicial power shall extend to all cases arising under the Constitution, laws and treaties of the United States." *Id.*, art. III, § 2. Abdication of the judiciary's oversight role would thus be no more appropriate with respect to rights and duties created by treaties than those created by other sources of law. *See Marbury*, 5 U.S. at 177 ("It is emphatically the province and duty of the judicial department to say what the law is.").

Of the Articles of Confederation, Madison stated: "Our Confederation is so notoriously feeble, that foreign nations are unwilling to form any treaties with us; they are apprized that our general government cannot perform any of its engagements, but that they may be violated at pleasure by any of the states." 3 DEBATES IN THE SEVERAL STATE

CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 135-36 (J. Elliot 2d. ed. 1836). If the courts decline to compel Executive compliance with "engagements" of our federal government, our nation is in danger not only of repeating the mistakes that led to the failure of the Articles of Confederation, but also breaking faith with the Constitution the Framers entrusted to us. Without habeas, mandamus is appropriate and necessary.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand the judgment of the Court of Appeals.

Respectfully submitted,

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